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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 100

ANDREW J. MAY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 101

MURRAY W. GARSSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 102

HENRY M. GARSSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. 159-176)[1] and dissenting (R. 176-187) opinions in the Court of Appeals have not yet been reported.

[1] "R." will be used herein to refer to the printed record, consisting of excerpts from the typewritten transcript of record on appeal, plus the proceedings in the Court of Appeals. References to the original typewritten transcript of record will be indicated by "Tr."

JURISDICTION

The judgments of the Court of Appeals were entered January 24, 1949 (R. 188), and petitions for rehearing were denied April 6, 1949 (R. 189-190). By orders dated April 20, 1949, and April 25, 1949, petitioners' time for filing petitions for writs of certiorari was extended by Mr. Justice Black to and including June 4, 1949 (R. 193-194), and the petitions were filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether a count charging conspiracy (1) to violate 18 U.S.C. [1940 ed.] 203 (making it unlawful for a member of Congress to accept compensation for services rendered in any matter in which the United States is interested) and (2) to defraud the United States, *inter alia,* of its right to the faithful and unbiased services of the member of Congress, is duplicitous.

2. Whether a count charging the receiver and the giver of the compensation, the receipt of which is proscribed by 18 U.S.C. [1940 ed.] 203, with conspiring to violate that statute is defective on the ground that the substantive offense itself necessarily requires "concert of action and agreement between the receiver and the giver"; and

whether, even if so, the point is material in this case in view of the fact that petitioners' sentences on the conspiracy count run concurrently with their sentences on the substantive counts.

3. Whether the one who gives the compensation, the receipt of which is made an offense by 18 U.S.C. [1940 ed.] 203, can properly be convicted of aiding and abetting the receipt.

4. Whether the evidence is sufficient to sustain the convictions.

5. Whether petitioners May and Henry Garsson obtained immunity from prosecution by virtue of their having testified before the Senate War Investigating Committee, prior to their indictment, concerning matters relating to the facts in this case.

6. Whether government exhibit 179, a stenographer's notebook, was unlawfully seized from petitioner Henry Garsson and erroneously received in evidence against him.

STATUTE INVOLVED

18 U. S. C. [1940 ed.] 203 provided in pertinent part:

> Whoever, being elected or appointed a * * * Member of * * * Congress, * * * shall, * * * during his continuance in office, * * * directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy,

charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than $10,000 and imprisoned not more than two years; and shall moreover thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States.

STATEMENT

Count 1 of a 4-count indictment (R. 2-17) filed in the District Court for the District of Columbia charged petitioners and one Freeman with having conspired, in violation of Section 37 of the Criminal Code (18 U. S. C. [1940 ed.] 88), "to commit offenses against the United States, that is, to violate Section 203 of Title 18 of the United States Code [*supra*], and to defraud the United States" (R. 2). The nature of the alleged conspiracy and the manner in which it was carried out were set forth in detail (R. 3-7) and 35 overt acts were alleged (R. 7-12). Count 3[2] charged petitioner May with having received a check for $5,000, in violation of 18 U. S. C. [1940 ed.] 203, *supra* (R. 14-15). Count 4 charged petitioner May with having agreed to receive sums of money totalling $53,634.07, in violation of the same statute (R. 15-

[2] Count 2 was identical with Count 3, except that the $5,000 involved therein was alleged in the former count to have been received in cash (R. 12-14). The Government elected to stand on the third count and abandon the second, as to which, accordingly, petitioners were granted motions for judgments of acquittal (R. 160).

17). Freeman and the petitioners Garsson were charged as aiders and abettors of May in counts 3 and 4 (R. 15, 16-17). Following a trial by jury, petitioners were found guilty on all three of the above counts and each was sentenced to imprisonment for from 8 months to 2 years on each count, the sentences to run concurrently (R. 151-153). Freeman was granted a judgment of acquittal on all counts (R. 160). On appeal to the Court of Appeals for the District of Columbia Circuit, petitioners' convictions were affirmed, one judge dissenting (R. 188).

The evidence adduced by the Government may be summarized as follows:

1. Petitioner Andrew J. May, throughout the period covered by the indictment (1942-1946), was a member of the House of Representatives and Chairman of the House Military Affairs Committee (Tr. 2343). Petitioner Henry Garsson was an officer and director of, and substantial shareholder in, two corporations, Erie Basin Metal Products, Inc., and Batavia Metal Products, Inc. (hereafter referred to as "Erie" and "Batavia," respectively) (Tr. 3641-3644). Petitioner Murray Garsson (Henry's brother) was an officer and director of both corporations (Tr. 810, 5853) and was also their Washington representative (Tr. 4473, 5228). The defendant Freeman was an assistant to Murray Garsson in his latter capacity (Tr. 5227-5228, 5246). Henry Garsson received annual salaries totalling $90,000 from Erie, Batavia, and a

subsidiary of the latter (Tr. 5072-5073). Murray Garsson received annual salaries totalling $55,000 from Erie and Batavia (Tr. 5011-5012). These two companies obtained approximately $78,000,000 in contracts from the War Department during the war (Tr. 3914).

May met Murray Garsson in 1941 (Tr. 2876), and they became close friends, addressing each other by their first names (G. Ex. 178, Tr. 3255). Murray Garsson and Freeman were often in May's office (Tr. 1082, 1693). May met Henry Garsson in 1942 (Tr. 3661), and in conversations with army officers May referred to Henry Garsson as his friend (G. Ex. 140, Tr. 1558; Tr. 1439, 1453).

2. *May's services to the Garssons and their corporations.*—Commencing in 1942 and continuing throughout the war, May intervened with the War Department many times, by letters, telephone calls and personal interviews, on behalf of the Garssons and their two corporations, Erie and Batavia. The evidence showed that May was constantly bringing pressure to bear on officials in the War Department to give war contracts to these companies (e.g., Tr. 1385-1389, 1439, 1479-1480, 1559-1560, 1579, 1784-1785, 1807-1809), protesting contract cancellations, terminations, and cut-backs (e.g., Tr. 1212-1214, 1220, 1229, 1259-1260, 1265, 1284, 1378-1381, 1417-1419, 1464-1467, 1558-1559, 2018-2019, 2136), interceding on behalf of the corporations in manpower disputes (Tr. 1583-1585, 1597-

1598, 1601, 1646, 1666, 1669-1671, 1794-1795, 1801), and the like.

In addition to his services on behalf of the corporations, the evidence showed that May interceded with the War Department and General Eisenhower in connection with a pending court-martial trial of Murray Garsson's son Joseph (Tr. 1702-1703, 1814-1815, 2058-2061); attempted to procure, on behalf of Freeman's son Albert, a furlough to this country from his overseas station (Tr. 1699, 1763, 2167-2168, 2172-2173); summoned a certain army officer to his, May's, office on numerous occasions to discuss with Murray Garsson and Freeman matters involving the transfer, promotion, and assignment of military personnel in whom they were interested (Tr. 1693-1694, 1698, 1738); interceded with Under Secretary of War Patterson in an effort to procure a commission for one Schwamm, a person in whom Murray Garsson was interested (Tr. 1919-1922, 1999-2001, 2022), etc.

3. *Evidence of May's ownership of the Cumberland Lumber Company.*—(a) In April 1943, May mentioned to Leroy Fields, Sr., a lifelong friend and constituent (Tr. 380, 385), that he "was interested in finding a good timber proposition" (Tr. 385). Fields advised May that a certain 2,200-acre tract in Letcher County, Kentucky, which was owned by the Mineral Development Company, could be purchased at $10 an acre (Tr. 386, 395). May told Fields that he had the backing of "big financial interests" from whom he could obtain the

necessary funds (Tr. 386, 567). They agreed that May would obtain the necessary capital for the purchase of this tract (Tr. 388); that a corporation would be organized, the stock of which would be owned equally by them (Tr. 388, 394, 395); and that Fields would manage the property (Tr. 411, 412).

On May 7, 1943, Mineral Development granted an option, covering the land in question, to May (G. Ex. 82, Tr. 1871; Tr. 1878). The option provided for the payment of $1,000 to Mineral Development at the time of execution (*ibid.*). On May 11, 1943, May transmitted to Mineral Development a cashier's check in the amount of $1,000 (G. Ex. 162, Tr. 1857; Tr. 1883). This check had been issued to one Raynes, who purchased the check at Murray Garsson's request and turned it over to the latter (Tr. 1909; G. Exs. 161-163, Tr. 1857). Mineral Development prepared a deed to the property, naming May as grantee, and sent May a copy for his approval (Tr. 2647-2648). At May's request, the grantee was changed to Cumberland Lumber Company, to which May said he was assigning the option (D. Ex. 67, Tr. 2647; Tr. 1876, 1982, 1983).

The purchase price of the land was $21,044.40. Henry Garsson delivered to Mineral Development a cashier's check in the amount of $10,044.40 as the second payment (G. Ex. 19, Tr. 189; Tr. 3685). To cover the $10,000 balance, four promissory notes of Cumberland Lumber Company, signed by Henry

Garsson as "President," each dated July 30, 1943, and in the amount of $2,500, were delivered to Mineral Development (D. Exs. 16, 59-61, Tr. 1965-1967).

(b) The Cumberland Lumber Company was incorporated on June 15, 1943 (G. Ex. 85, Tr. 2177; G. Ex. 170, Tr. 2211) and qualified to do business in Kentucky on August 5, 1943 (G. Ex. 86, Tr. 1096), May being designated as resident agent (G. Ex. 170, Tr. 2211). The corporation was organized by the Corporation Trust Company at the request of one Levin, a Washington attorney, deceased at the time of the trial (Tr. 1091, 1092). On June 15, 1943, Murray Garsson, Freeman, and Levin were named directors, but no stock was issued (Tr. 1094). On January 26, 1945 (G. Ex. 87, Tr. 1098) and again on March 1, 1945 (G. Ex. 88, Tr. 1099), the Corporation Trust Company wrote May for payment of its annual fee from Cumberland Lumber Company, stating in each letter that it had been informed by Levin that he, May, was the "only person interested in maintaining the life of this Corporation." May did not reply to either letter (Tr. 1098), but sent his personal check in payment of the fee on July 2, 1945 (G. Ex. 90, Tr. 1103).

(c) Contrary to the understanding reached with May, Fields never received any stock in the Cumberland Lumber Company. He continued to manage the timber project on a salary basis, however, until March 13, 1944, when May discharged him (G. Ex. 59, Tr. 485; Tr. 415, 488). During this

period, May wrote numerous letters to Fields concerning the affairs of the company and covering such subjects as the purchase of a mill (G. Ex. 37, Tr. 398; G. Ex. 41, Tr. 433; G. Ex. 43, Tr. 437), the location of a mill site (G. Ex. 38, Tr. 402; G. Ex. 51, Tr. 458), the cutting of mine timber (G. Ex. 43, Tr. 437; G. Ex. 44, Tr. 440), the construction of a log chute (G. Ex. 45, Tr. 442, 444, 445; G. Ex. 46, Tr. 445), etc. In various letters May urged Fields to sell certain timber while the price was high (G. Ex. 38, Tr. 402; G. Ex. 39, Tr. 408). In November 1943, May forwarded a letter which he had received from a certain company offering to purchase 200,000 feet of lumber at certain prices (Tr. 457), with the comment that the prices offered did not seem high enough (G. Ex. 50, Tr. 456). But in no instance did May ever instruct Fields to cut lumber for Erie or Batavia (Tr. 406, 407, 434).

May's son succeeded Fields as manager of the project until the former's death in June 1944 (Tr. 620, 637, 638). Then May's nephew, known as "Little Jack," was appointed manager by May on a salary basis (Tr. 606). He served in that capacity until December 1944 (Tr. 607). Lumber was sold during this period (Tr. 618), but at no time did "Little Jack" receive instructions from May to sell or store lumber for Erie or Batavia (Tr. 615, 618).

(d) On April 1, 1945, May and one Brown entered into an agreement whereby Brown would purchase the entire timber project from May for

$32,500, $5,000 to be paid on July 1, 1945, and the balance at the rate of $7 per thousand feet of timber manufactured (Tr. 658).[3] Pursuant to this agreement, Brown entered on the tract and expended considerable of his own funds for operations and equipment (Tr. 670-671). On May 25, 1945, however, May wrote Brown that he had conferred with "his associates" and that they had decided not to sell since they were users of large quantities of lumber (G. Ex. 64, Tr. 671). Previous to this, May had never informed Brown that any one other than himself had an interest in the property (Tr. 667, 668), and had dealt with Brown as if he, May, had been the sole owner (Tr. 669). Brown then demanded that May settle with him in regard to the $4,000 to $5,000 he had spent out of his own funds and take back the property (Tr. 674). May, however, told Brown to remain on the property, as he thought they could arrive at a satisfactory agreement (*ibid.*). Brown stayed on, cutting and selling lumber (Tr. 678). He did not store any lumber for Erie or Batavia (Tr. 679), however, nor did May ever mention those companies to him or any purchase orders from them (Tr. 673).

In the fall of 1945, one Burns offered May $50,000 for the property, which May was willing to accept (Tr. 691-692, 697). Brown, however,

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[3] On April 24, 1945, May wrote Franklin & Co., one of his lumber customers, that "I have sold the property which I owned on Cumberland River in Letcher County, Kentucky, and the new owner will take possession shortly" (G. Ex. 101, Tr. 649).

claimed an interest in the property by virtue of his previous agreements with May and his capital outlays, and May was unwilling to meet the figure Brown demanded by way of settlement (Tr. 694-695). As a result, the sale to Burns was never consummated (Tr. 717). Cumberland Lumber Company brought an ejectment action against Brown in March, 1946 (D. Ex. 21, Tr. 2624). Brown and May appeared at the hearing (Tr. 700) and May offered to settle for $40,000 in cash, Brown to get clear title to the land and all equipment (Tr. 700, 784). Brown accepted the offer and delivered a $40,000 draft to May (Tr. 792).

4. *May's receipt of funds, through the Cumberland Lumber Company, from the Garssons and their corporations.*—(a) On July 8, 1943, Erie issued a check in the amount of $10,000 to Murray Garsson (G. Ex. 3, Tr. 820). This was a "loan" to Murray Garsson, for which he gave his promissory note. Henry Garsson endorsed Murray Garsson's name on this check, and, on July 19, 1943, used the proceeds thereof to purchase a $10,000 cashier's check (G. Ex. 17, Tr. 189; Tr. 185, 192). This cashier's check, payable to Murray Garsson, was used by May on July 26, 1943, to open an account in the First National Bank of Prestonburg, Kentucky, in the name of the Cumberland Lumber Company (G. Ex. 27, Tr. 203; G. Ex. 17, 21, Tr. 202). The check, which had been delivered to May by Murray Garsson (Tr. 2668), bore the endorsements of "Murray W. Garsson" and "Cumberland

Lumber Co.," the latter endorsement being in May's handwriting (Tr. 183, 203). May alone was authorized to draw on the account (Tr. 202). The bank officer who received the deposit asked May who the directors of the Cumberland Lumber Company were and was informed by May that there were none as the company was "merely incorporated" (Tr. 201). May also advised the officer that no stock had been issued, and from the conversation the officer understood that Cumberland was owned by May and his family (Tr. 201, 239).

(b) On July 31, 1943, Erie issued a check in the amount of $10,000 to Henry Garsson (G. Ex. 4, Tr. 820). This was a "loan" to Henry Garsson, for which he gave his promissory note. Henry Garsson used the proceeds of this check to purchase a cashier's check, dated August 6, 1943, payable to himself in the amount of $10,044.40 (G. Ex. 19, Tr. 189). This cashier's check was used to make the second payment (see p. 8, *supra*) to the Mineral Development Company for the purchase by May of the timber tract in Letcher County, Kentucky (Tr. 3685).[4]

[4] In addition to the two $10,000 loans described in (a) and (b), *supra*, Erie had loaned the Garssons each $5,000 in the previous month, June, 1943, issuing a $5,000 check, dated June 6, 1943, to Henry Garsson (G. Ex. 1, Tr. 812) and another $5,000 check, dated June 7, 1943, to Murray Garsson (G. Ex. 2, Tr. 812). The four items, totalling $30,000, were carried by Erie on its books under a loan account until November 30, 1943, when they were charged as "an advance on materials due from Cumberland Lumber Co." (Tr. 820, 821). At the end of the company's 1944 fiscal year, the items were transferred to an inventory account (see pp. 17-18, *infra*) (Tr. 822).

(c) On January 27, 1944, Batavia issued a check in the amount of $5,000 to Cumberland Lumber Company (G. Ex. 8, Tr. 233), pursuant to the request of Henry Garsson, as "an advance on purchases" (Tr. 843). On February 2, 1944, May deposited this check in the Cumberland account in the First National Bank of Prestonburg, endorsing it "Cumberland Lumber Company" (G. Ex. 28, Tr. 233).

(d) On June 9, 1944, Batavia issued a check in the amount of $1,500 to the First National Bank of Batavia in payment of a draft in that amount drawn by May on Batavia in the name of the Cumberland Lumber Company (G. Ex. 9, Tr. 314; G. Ex. 11, Tr. 216). May himself received the proceeds of this draft (Tr. 214, 215). The Batavia comptroller was told by Henry Garsson to pay the draft as "it was an advance" to Cumberland for box lumber (Tr. 320-324).

(e) On July 3, 1944, Batavia issued a check in the amount of $2,500 to Cumberland Lumber Company (G. Ex. 12, Tr. 234) as an "advance on box lumber" (Tr. 326). On July 5, 1944, May deposited this check in the Cumberland account in the First National Bank of Prestonburg, endorsing it "Cumberland Lumber Company, A. J. May" (G. Ex. 29, Tr. 234).

(f) On August 18, 1944, Erie issued a check in the amount of $5,000 to Murray Garsson (G. Ex. 5, Tr. 359; Tr. 881, 882). This check, endorsed by

Murray Garsson and May, was cashed by May on August 22, 1944, and $4,000 of the proceeds was deposited in May's personal account in the National Bank of Washington, Washington, D. C. (G. Ex. 33, Tr. 359). Against this deposit May drew checks for personal expenses, including tuition, taxes, hotel rent, photographs, and association dues (Tr. 3021-3024). The total of these withdrawals was approximately $1,300 (Tr. 3024). In explanation, May testified that a few days after receiving the check in question he was asked by Levin, the attorney who incorporated the Cumberland Lumber Company (deceased at the time of the trial), to pay his fee and that he wanted it in cash (Tr. 2684); and that he gave $1,300 in cash, which he had in a lock box in his office, to Freeman to deliver to Levin (Tr. 2684, 3024). Freeman testified that he received the money from May and delivered it to Levin (Tr. 6010-6013). However, neither Levin's cash book (G. Ex. 187, Tr. 6222) nor his income tax return for 1944 (G. Ex. 186, Tr. 6244), which the Government introduced in evidence in rebuttal, reflected the receipt by Levin of such a fee.

It was the $5,000 check described in (f), *supra,* on which count 3 (R. 14-15) of the indictment was predicated.

(g) On November 18, 1944, Erie issued a check in the amount of $3,156.47 to Cumberland Lumber Company (G. Ex. 6, Tr. 222). On December 11, 1944, May deposited this check in his personal

checking account in the First National Bank of Prestonburg (G. Ex. 23, Tr. 222). This amount represented the difference between the total amount of certain invoices of Cumberland to Erie for alleged lumber purchases ($33,156.47) and the $30,000 originally carried by Erie as "loans" to the Garssons but later charged as "an advance on materials due from Cumberland Lumber Co." (see footnote 4, *supra*, p. 13) (Tr. 815-816). The invoices were marked "paid" following payment of this check (Tr. 815).

(h) On March 9, 1945, Batavia issued a check in the amount of $1,850 to Cumberland Lumber Company (G. Ex. 14, Tr. 224). On March 14, 1945, May deposited this check in his personal checking account in the First National Bank of Prestonburg (G. Ex. 24, Tr. 224). Against this deposit May drew checks for payment of sundry personal expenses, such as a department store bill, hotel bill, income taxes, etc. (Tr. 3014-3017).

(i) On July 2, 1945, Batavia issued a check in the amount of $4,627.60 to Cumberland Lumber Company (G. Ex. 15, Tr. 229). On July 7, 1945, May deposited this check in his personal account in the Prestonburg Bank (G. Ex. 25, Tr. 229). May also drew checks against this deposit for personal obligations (Tr. 3027-3028).

5. *The fictitious transactions of the Cumberland Lumber Company with the Garssons' corporations.*

(a) *Erie.*—On October 29, 1943, Erie issued its

purchase order No. 7117 to the Cumberland Lumber Company for designated quantities of box lumber (G. Ex. 103, Tr. 824). The order contained the following statement: "The $30,000 paid you [see *supra,* pp. 12-13, and footnote 4] shall be considered an advance payment against this order and lumber shall be stored for our account until dry and pending shipping instructions." At the time of the issuance of this order, the mill on the Cumberland timber tract had not yet been erected (Tr. 458). Neither Fields, who managed the Cumberland project until March 1944 (*supra,* p. 9) nor May's nephew, "Little Jack," who managed it from June to December 1944 (*supra,* p. 10), ever saw this order (Tr. 437, 610). May himself testified he never saw it until the trial and knew nothing about it (Tr. 2845, 3116). Glick, an Erie official, was "certain" that the order was delivered to Henry Garsson rather than sent to Cumberland (Tr. 830). The Government introduced in evidence a purchase order from Erie to another company, bearing the same number and date as that issued to Cumberland (G. Ex. 104, Tr. 887), which the evidence showed was genuine and legitimate (Tr. 925-930).

The $30,000 in "loans" advanced to the Garssons by Erie in June and July 1943 (*supra,* pp. 12-13, and footnote 4) had, at the end of the fiscal year 1943, been charged on Erie's books as "advances" on purchases (Tr. 830). Glick, prior to the date of the 1944 closing of the books, inquired of Henry

Garsson several times whether the item should be treated in the books as in the previous fiscal year, or whether there would be an invoice and evidence of delivery of the material (Tr. 830). In November 1944, Henry Garsson delivered three invoices of Cumberland to Glick, stating that the lumber was being stored for Erie at Whitesburg, Kentucky (Tr. 816, 830, 831, 834). The invoices were dated October 11, October 23, and November 2, 1944 (G. Exs. 105-107, Tr. 825-827), and totalled $33,156.47. A check for $3,156.47 (balance above the $30,000 in "advances") was then made out (G. Ex. 6, Tr. 222) and was eventually received by May (see pp. 15-16, *supra*). The invoices were then marked "paid" (Tr. 815). No lumber, however, was ever delivered to Erie under these invoices (Tr. 825, 831).

(b) *Batavia.*—In February and March 1944, Batavia issued to Cumberland two purchase orders for lumber (G. Exs. 109, 110, Tr. 849). The Government introduced in evidence a Cumberland invoice to Batavia, dated March 29, 1945, in the amount of $10,850 (G. Ex. 108, Tr. 933). As of that date Batavia had made four "advances" to Cumberland, totalling $10,850 (G. Exs. 8, 9, 12, 14, Tr. 233, 314, 234, 224; see (c), (d), (e), and (h), *supra,* pp. 14, 16). In November 1945, O'Connor, a Batavia employee, was instructed by Henry Garsson to insert in Batavia's inventory book a sheet indicating that, as of April 30, 1945, there

was a lumber inventory of $10,850 (Tr. 939). Garsson told O'Connor that the purpose of this was to have "a page in there in the same handwriting as the rest of the inventory to show to the [Senate War Investigating] Committee" (Tr. 940). O'Connor did as instructed (G. Ex. 111A, Tr. 941). No lumber, however, was ever delivered to Batavia under this invoice (Tr. 1051, 1073).

ARGUMENT

1. Petitioners contend (May Pet. 34-35; Henry Garsson Pet. 47-51; Murray Garsson Pet. 14-15) that the conspiracy count is duplicitous because it charges that the object of the conspiracy was twofold, *i.e.*, to violate 18 U.S.C. [1940 ed.] 203 and to defraud the United States. We submit that the contention is without merit. "Countenance we believe has been given by some Courts to the notion that a single count in an indictment for conspiring to commit two offences is bad for duplicity. This Court has given it none. [Citing cases.] The conspiracy is the crime, and that is one, however diverse its objects." *Frohwerk* v. *United States*, 249 U.S. 204, 209-210; *Braverman* v. *United States*, 317 U.S. 49, 54; *Pinkerton* v. *United States*, 328 U.S. 640, 642-643; *United States* v. *Manton*, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664.

This is not a case in which the substantive offense alleged to be an object of the conspiracy charged—for example, theft from an interstate

shipment—bears no logical relation to defrauding the United States, with which it is linked as an objective of the conspiracy. On the contrary, violation of 18 U.S.C. [1940 ed.] 203—prohibiting a member of Congress from accepting compensation for services rendered in any matter in which the United States is interested—bears an obvious relation to defrauding the United States of its right to the faithful and unbiased services of a member of Congress and officers of the War Department, the defrauding charged (R. 3-5). Consequently the conspiracy charge here is analogous to the conspiracy charge in the *Manton* case, *supra* (conspiracy to obstruct the administration of justice, in violation of 18 U.S.C. [1940 ed.] 241, and to defraud the United States of its right to the faithful and unbiased services of a federal judge), and is clearly not duplicitous.

2. The dissenting judge below was of the view that the conspiracy count in this case is defective for a further reason. His reasoning and conclusion are stated in the following passage of his opinion (R. 180):

> The offense against the United States, violation of 18 U.S.C. § 203 (1946) [*supra*, pp. 3-4] which the defendants are in Count I charged with having conspired to commit is one requiring, from its very nature, concert of action and agreement between the parties involved. The offense is receipt of compensation by a member of Congress for services rendered or

> to be rendered. But receipt of compensation cannot be accomplished without compensation also being given and requires therefore concert of action and agreement between the receiver and the giver. This being so, it is not legally possible to make the commission of such an offense the subject of a conspiracy charge. It is like charging a conspiracy to conspire.

Petitioners now adopt this argument (May Pet. 35-37; Henry Garsson Pet. 54-61; Murray Garsson Pet. 9-12). We submit, however, that the reasoning of the majority opinion below on this issue (R. 165-167) is the sounder, and that there are several answers to the dissenting judge's argument.

(a) In the first place, the argument would seem to be squarely refuted by Mr. Justice Holmes' statement in *United States* v. *Holte,* 236 U.S. 140, 145, that "a conspiracy with an officer or employe of the government or any other for an offence that only he could commit has been held for many years to fall within the conspiracy section, now § 37 of the penal code [citing cases]." See also *Ex parte O'Leary,* 53 F. 2d 956, 957 (C.A. 7), certiorari denied, 283 U.S. 830.

(b) Secondly, it does not follow, we submit, from the fact that there cannot be a receiver of compensation without there also being a giver, that to accuse the giver and the receiver with conspiring to violate a statute which prohibits the

receipt of compensation under specified conditions "is like charging a conspiracy to conspire." True, the receipt of compensation necessarily implies the giving thereof, and the receipt and giving will normally be preceded by agreement. But to charge the two actors in the transaction with conspiring to effect the recipient's act of receiving is not the same thing as to charge them with conspiring to enter into this agreement. 18 U.S.C. [1940 ed.] 203 (the statute which petitioners were charged with conspiring to violate), it is to be observed, itself proscribes both receiving and agreeing to receive (*supra,* pp. 3-4). If count 1 had charged a conspiracy to commit the latter offense (agreeing to receive), the dissenting judge's criticism of the count might have merit. Manifestly, however, it was the former offense (receiving) that was charged as the object of the alleged conspiracy.

(c) Thirdly, *United States* v. *Dietrich,* 126 Fed. 664 (C. C., D. Neb.), on which the dissenting judge relies in this respect (see R. 180-184), involved a charge of conspiracy to violate a statute which specifically proscribed both the receipt and the giving of compensation for certain forbidden purposes (as well as agreement to do either). The decision is therefore distinguishable from the present case, which involves a substantive statute that is silent in respect of giving.

(d) Fourthly, even if the dissenting judge's point were otherwise well taken, the fact remains

that the conspiracy charged by count 1 had for its purpose not only the violation of a specific statute but also the defrauding of the United States (*i.e.*, of and concerning its right to the unbiased services of Congressman May and officials in the War Department (see R. 3-5)). And, as observed by the majority below (R. 167), "the United States can be defrauded without concert of action."

(e) Finally, even if it were true that the conspiracy count is defective for the reasons assigned by the dissenting judge, and even if the alleged conspiracy "merged" in the substantive offenses alleged in counts 3 and 4, as petitioners urge in a cognate contention (May Pet. 35; Henry Garsson Pet. 54), the judgments of conviction still could not be successfully assailed. Each petitioner received an identical sentence of imprisonment under each count, and all sentences were directed to be served concurrently. It is settled law that under such circumstances any good count will sustain the sentences imposed. *Hirabayashi* v. *United States,* 320 U. S. 81, 85; cf. *Pinkerton* v. *United States,* 328 U. S. 640, 641-642, note 1.

3. Petitioners Henry Garsson (Pet. 61-66) and Murray Garsson (Pet. 12-14) further contend that they were improperly charged and convicted on the two substantive counts, 3 and 4, because the statute on which those counts were based (18 U. S. C. [1940 ed.] 203, *supra,* pp. 3-4) denounces only the improper receipt of compensation for services rendered, and does not make criminal the giving of

such compensation.[5] But they, as givers of the compensation, certainly aided and abetted May's receipt thereof, as count 3 [6] charged (R. 15). Under 18 U. S. C. [1940 ed.] 550,[7] therefore, they were equally guilty with May and in fact principals in May's offense.[8] This statute, as remarked by the majority below (R. 167), "provides that whoever aids or abets the commission of any act constituting an offense defined in any law of the United States, is a principal in the offense. No language in the statute before us [*i.e.*, 18 U. S. C. [1940 ed.] 203] makes an exception to that general provision. To sustain appellants' contention, we would have to write, or read, such an exception into the otherwise unqualified general statute dealing with aiders and abettors. We think we cannot do that."

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[5] Petitioner May also argues this point (Pet. 37-39), but since he comes squarely within the proscription of the statute on which counts 3 and 4 are founded, the argument clearly cannot avail him. The dissenting judge below seems to have concluded otherwise (R. 186-187), but we submit that his reasoning on this point does not support the conclusion reached.

[6] Count 4 charged May with "agree[ing] to receive" specified sums in compensation for services rendered, and the Garssons with aiding and abetting such "agreement" (R. 15-17). For the sake of simplicity, only count 3 will be considered in this connection. This is permissible, as we pointed out at p. 23, *supra*, since the sentences on these two counts are identical and run concurrently.

[7] "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

[8] It is well settled that, though a person may be incapable of committing a particular crime, he still may aid and abet its commission and hence be liable as a principal. *Gebardi* v. *United States*, 287 U.S. 112, 120-121, footnote 5; *Barron* v. *United States*, 5 F. 2d 799, 802 (C.A. 1).

It is true that a person's *mere acquiescence* in another's crime, which by its nature cannot be committed without such acquiescence, does not render the person so acquiescing punishable either as a principal or co-conspirator. Thus, it was held in *Gebardi* v. *United States,* 287 U. S. 112, that a woman who is the willing object of a transportation which violates the Mann Act, but who does not aid or assist in the transportation otherwise than by her consent, is not properly chargeable either as a principal in the offense or as a co-conspirator with the principal in its commission. Similarly, "It is not to be supposed that the consent of an unmarried person to adultery with a married person, where the latter alone is guilty of the substantive offense, would render the former an abettor or a conspirator, * * * or that the acquiescence of a woman under the age of consent would make her a co-conspirator with the man to commit statutory rape upon herself." *Id.,* at p. 123. But where there is something more than mere acquiescence—as, for example, where the willing woman in a Mann Act case "should suggest and carry out [the] journey * * * in the hope of blackmailing the man, and should buy the railroad tickets, or should pay the fare * * *"—it is settled that there is no legal obstacle to charging the necessary partner in the criminal venture either as an aider and abettor or as a co-conspirator. *United States* v. *Holte,* 236 U. S. 140, 145; cf. *Gebardi* v. *United States, supra,* at 117. We submit that the instant case is one that

is clearly outside the scope of the *Gebardi* decision and the adultery and statutory rape cases considered in that opinion.[9] Nor, we think, does it come within the principle of those cases (see *Gebardi* v. *United States, supra,* at 119) which hold that the purchaser of liquor is not to be regarded as an abettor of the illegal sale. The question is essentially one of the intent of Congress, and, as the opinion of the court below makes clear (R. 167-168), the legislative history of the statutes here concerned does not support the inference that Congress had an unspoken intent to make the active aiding and abetting of the offense proscribed by section 203 of Title 18 an exception to the provisions of section 550 of that title. An intent which may reasonably be imputed to Congress where the question is whether a purchaser of a bottle of liquor from a bootlegger is to be punished as severely as the bootlegger himself cannot reasonably be inferred as to the immensely more serious and dangerous acts here concerned. It is equally unrealistic to liken one who pays a Congressman compensation for service rendered—compensation which it is criminal for the Congressman to accept—and thereby procures vast financial advantages at the expense not only of his competitors but of the nation itself, to the acquiescent female victim in the Mann Act,

[9] The *Gebardi* decision, it is to be noted, was based solely on the Court's belief that "the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent" evidenced "an affirmative legislative policy to leave her acquiescence unpunished" (287 U.S. at 123).

adultery and statutory rape cases with which the *Gebardi* decision was concerned. He clearly does more than "merely acquiesce" in the recipient's offense; he actively aids and abets the commission of the offense.

It is argued, however, that Congress' failure specifically to denounce the giving of compensation in 18 U. S. C. [1940 ed.] 203 evidences an intent to leave the giving unpunishable notwithstanding the aider-and-abettor statute. The fact that a related statute, 18 U. S. C. [1940 ed.] 202 (proscribing the receipt of money or other consideration by members of Congress and others for procuring any contract or appointive office for any person), specifically denounces both the receipt and the giving of such consideration is pointed to as further evidence of such a congressional intent. Concededly, as the majority below observed (R. 168), there would be some force in this argument "if the two sections had been adjoining sections in the same original congressional enactment." But, as the majority also pointed out (*ibid.*), such is not the case. The two sections adjoined in the Criminal Code of 1909 (§§ 112 and 113) and in the Revised Statutes (§§ 1781 and 1782), but were originally enacted on different occasions—the one on July 16, 1862 (c. 180, 12 Stat. 577; amended February 25, 1863, c. 61, 12 Stat. 696) and the other on June 11, 1864 (c. 119, 13 Stat. 123).

4. Petitioners all challenge the sufficiency of the evidence to sustain their convictions (May Pet. 10-

11, 40; Henry Garsson Pet. 24; Murray Garsson Pet. 7). The Government's proof of the existence of the conspiracy charged, however, was, we submit, clear and compelling. The evidence summarized in the Statement, *supra,* at pp. 5-19, is by no means exhaustive, but it suffices to show that the trial court was plainly warranted in submitting the case to the jury. That the evidence was circumstantial is of course not a valid criticism of its sufficiency, since the existence of a conspiracy, from the very nature of the crime, can rarely be established by direct proof. *United States* v. *Manton,* 107 F. 2d 834, 839 (C. A. 2), certiorari denied, 309 U. S. 664. The evidence under substantive count 3 is also clearly sufficient (see paragraph (f), *supra,* pp. 14-15), and there is no occasion to demonstrate the sufficiency of the proof under the other substantive count, 4, since each petitioner's sentence on the latter count is identical with his sentence on the former, and runs concurrently with it.[10]

5. Petitioners May and Henry Garsson both testified before the Senate War Investigating Committee (the so-called Mead Committee), prior to their indictment, concerning various matters relating to the facts in this case. May testified voluntarily. Henry Garsson appeared under subpoena,

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[10] We mention the substantive counts in this connection, notwithstanding that each petitioner's sentences on all counts are identical and run concurrently, for the reason that violation of 18 U.S.C. [1940 ed.] 203, on which the substantive counts are predicated, renders the offender incapable thereafter of holding "any office of honor, trust, or profit under the Government of the United States"—a disability not incurred as a result of conviction on the conspiracy count.

and, it appears, "made a general statement claiming and refusing to waive 'his constitutional privilege' [against self-incrimination]" (R. 164, 161-162). Nevertheless, Henry Garsson "did not refuse to answer any question; so far as the record shows, he was not compelled" (R. 164). These petitioners now contend that, by virtue of their having testified before the Committee, they automatically obtained immunity from prosecution for the offenses of which they have been convicted (May Pet. 30-32; Henry Garsson Pet. 68-74). The contention is clearly without merit.

There is no statute, applicable to testimony before a congressional committee, comparable to those involved in *Smith* v. *United States,* No. 292, 1948 Term, decided May 31, 1949, and *United States* v. *Monia,* 317 U. S. 424, whereby self-incriminating testimony may be compelled, and in exchange, as it were, for such deprivation of what would otherwise be a constitutional right, there is conferred immunity from prosecution "for or on account of any transaction, matter, or thing" concerning which testimony is given. These petitioners' attempt to "spell out" such immunity from two statutes—28 U.S.C. [1946 ed.] 634 [11] and 2 U.S.C. [1946 ed.] 192 [12]—is

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[11] "No testimony given by a witness before either House, or before any committee of either House, * * * shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."

[12] "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony

patently futile. The former is simply what it purports to be—a statute forbidding the use of a witness' testimony before a congressional committee in any subsequent criminal proceeding against him; it does not confer immunity from prosecution. *Counselman* v. *Hitchcock,* 142 U.S. 547, 564-565, 585-586. The latter makes it an offense to refuse to divulge pertinent information to a congressional committee; but it cannot constitutionally be construed, by virtue of the bar of the Fifth Amendment, to apply to self-incriminating testimony. *Counselman* v. *Hitchcock, supra.* In fact, it is precisely for the purpose of compelling self-incriminating testimony that immunity statutes have been enacted. *Smith* v. *United States, supra; Shapiro* v. *United States,* 335 U.S. 1, 28-29; *Brown* v. *Walker,* 161 U.S. 591, 594-595. And, as we have indicated, no such statute has been enacted relative to testimony before a congressional committee. Consequently, neither May nor Henry Garsson could have been compelled to incriminate himself before the Mead Committee. Indeed, the fact that Henry Garsson stated to the Committee that he was not waiving his constitutional privilege against self-incrimination shows that he was well aware of that fact. This case, therefore, simply

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or to produce papers upon any matter under inquiry before either House, * * * or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine * * * and imprisonment * * *."

does not involve any question of immunity.[13]

6. Petitioner Henry Garsson contends (Pet. 79-83) that a certain stenographer's notebook (G. Ex. 179, Tr. 5909) was erroneously received in evidence. He charges that it was his personal property and was unlawfully seized without a warrant. The contention is clearly without merit.

The notebook in question was one of a large number of items taken by agents of the Government from Batavia Metal Products, Inc., pursuant to a subpoena *duces tecum* directed to that company. The items were voluntarily surrendered by attorneys for the company. Some of the items subsequently proved to be personal property of Henry Garsson and were returned to him. Others, including the notebook in question, were not re-

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[13] A related contention of petitioners May (Pet. 32-34) and Henry Garsson (Pet. 73-74) is that "testimony given" by them before the Mead Committee was used against them in this prosecution, in violation of 28 U.S.C. [1946 ed.] 634 (quoted in pertinent part in footnote 11, *supra*, p. 29). However, neither refers to any specific testimony given by him before the Committee and allegedly used by the prosecution against him in this case, and in fact there was none. It is not true that "It has never been denied by the prosecution that [May's] testimony [before the Committee] was used before the grand jury" (May Pet. 33). On the contrary, the prosecution categorically denied this charge, made in connection with several pre-trial motions attacking the indictment (R. 38; see also Transcript of proceedings on February 21 and 25, 1947, pp. 109-111). Both these petitioners also suggest (May Pet. 33; Henry Garsson Pet. 73-74) that some of the evidence presented by the Government to the grand jury resulted from "leads" obtained from their testimony before the Committee. It is not necessary, however, to consider whether, even if this were true, it was forbidden by the statute in question, since in each instance the suggestion is sheer speculation.

turned for the reason that they were corporate property of Batavia and hence properly received under the subpoena. (See Transcript of proceedings on April 3 and 9, 1947, pp. 53-81.) There can be no doubt that this notebook was corporate property and contained notes of corporate business. See Henry Garsson's testimony on cross-examination at the trial (Tr. 4458-4462). It was therefore properly taken pursuant to the subpoena. *Wilson* v. *United States,* 221 U.S. 361.

We have thus far discussed and answered what we consider to be the principal contentions of the petitions for certiorari. Petitioners make a number of other contentions, but to answer each in detail would unduly lengthen this brief in opposition to certiorari. We think it is unnecessary to do so. Each of the remaining contentions is carefully examined and rejected in the majority opinion below, which in our judgment fully demonstrates their lack of merit. None of these contentions, moreover, was found meritorious by the dissenting judge, whose opinion was based entirely on what he thought were defects in the indictment (R. 176). We have already discussed each of these alleged defects. For the convenience of the Court, we set forth below the nature of petitioners' additional contentions, references to the pages of the petitions in which they are made, and references to the majority opinion where they are considered:

(1) Alleged illegal constitution of the grand jury (May Pet. 39-40; Henry Garsson Pet. 75-78; Murray Garsson Pet. 15-16); considered below at R. 164.

(2) Refusal to strike all the evidence concerning the acquitted codefendant Freeman (May Pet. 43-45; Henry Garsson Pet. 84-85); considered below at R. 169.

(3) Exclusion of evidence as to alleged discrimination by the War Department against the Garssons' companies, the excellent production records of the companies, the functions of the Military Affairs Committee, justification of the complaints made to May by the Garssons, etc. (May Pet. 46-49); Henry Garsson Pet. 97-104); considered below at R. 172-173; see also R. 170.

(4) Alleged errors in admitting evidence (Henry Garsson Pet. 86-96); considered below at R. 169-170.

(5) Alleged errors in the charge and refusal to grant certain requested instructions (May Pet. 49-51; Henry Garsson Pet. 112-123); considered below at R. 176.

(6) Alleged unfairness of the trial (May Pet. 51-52; Henry Garsson Pet. 105-111); considered below at R. 173-175.

CONCLUSION

The petitions for writs of certiorari do not, in our opinion, present any question requiring further review by this Court. We therefore respectfully submit that they should be denied.

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JULY 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 044630 15